



NATURAL RESOURCES DEFENSE COUNCIL

December 8, 2008

Mr. Ren Lohofener
Regional Director
U.S. Fish and Wildlife Service
2800 Cottage Way
Sacramento, CA 95825-1846

Mr. Donald Glaser
Regional Director
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825-1846

RE: Biological Opinion on the Effects of the Operations Criteria and Plan (OCAP) on Threatened Delta Smelt

Dear Mr. Glaser and Mr. Lohofener:

The Natural Resources Defense Council (NRDC), representing more than 250,000 members and activists in California, is writing to request that the U.S. Fish and Wildlife Service (Service) issue its final biological opinion regarding the impacts of the Operations Criteria and Plan (OCAP) on delta smelt by December 15. We have been informed that the Service's final draft of the biological opinion (BO) was forwarded to the U.S. Bureau of Reclamation and the California Department of Water Resources (DWR) before Thanksgiving, and we have learned that certain parties are seeking to delay issuance of the final biological opinion. Because our requests to obtain a copy of the document to date have been declined,¹ we have not reviewed a copy of the draft biological opinion. However, for the reasons expressed below, timely issuance of the final biological opinion is essential.

As you know, the court ordered deadline for completion and issuance of the opinion is December 15, 2008. That deadline was already extended once by the Court, in part because the Service informed the Bureau and DWR on numerous occasions that additional information, and clarification of inaccurate data and modeling, was required, but these agencies failed to respond to the repeated requests for information in a timely manner.² Despite these obstacles, our understanding from the Bureau is that the Service has completed its draft opinion.

The new BO is needed to help protect delta smelt this winter because the protections mandated by the district court are only temporary in nature. In addition, prompt issuance of a lawful BO will help restore predictability and reliability to Central Valley Project (CVP) and State Water Project (SWP) operations, which have been undermined by the previously unlawful OCAP biological opinions. Moreover, timely issuance of the BO is critical to reviving the State's

¹ We note that the Service's ESA Consultation Handbook states that once a draft biological opinion is shared with an applicant, such as DWR here, "the document may no longer be considered an interagency memorandum exempt from the disclosure requirements of the Freedom of Information Act". USFWS, NMFS, Final ESA Section 7 Consultation Handbook at 1-12 (March 1998).

² See Memorandum from the U.S. Fish and Wildlife Service to the Bureau of Reclamation dated June 27, 2008, available online at http://www.fws.gov/sacramento/es/documents/OCAP%20status%20report/6-27-08--OCAP--30day--more_info_required_memo.pdf.

battered salmon fishing industry, which has long suffered the brunt of water project mismanagement. Federal officials acknowledge that delta smelt protections in the winter months have significant benefits for salmon and steelhead that migrate through the estuary, and the forthcoming delta smelt biological opinion was one of the reasons why the district court refrained from imposing delta pumping restrictions to protect endangered salmon and steelhead this winter.³

Ultimately, a strong delta smelt BO also protects human users of water. We have attached a recent opinion-editorial published in the Sacramento Bee by Tom Zuckerman, a farmer in the Delta and Zeke Grader, executive director of the State's largest commercial fishing organization, which explains why protecting the delta smelt protects delta farming and salmon fishermen as well as the environment.

Because the Bureau and DWR proposed operations of the CVP and SWP to the Service that excluded any of the protections required by the district court's interim order,⁴ or any other operational restrictions to protect delta smelt, there should be little question that the BO will conclude that project operations, as proposed, would cause jeopardy to the survival and recovery of the delta smelt and adversely modify its critical habitat. We, like many others, anticipate that the final BO will include reasonable and prudent alternatives that require both (1) operational restrictions at least as protective as those required by the district court to reduce entrainment and mortality of delta smelt at the Project pumps, and (2) additional measures to protect critical habitat and to ensure that operations do not jeopardize the recovery of the species (particularly in the Fall months). The best available science supports these protections, as recognized by the Service in the previously-released draft effects analysis of the BO and confirmed by an independent peer review.

Other experts have also confirmed the need for these protections. A team of experts convened by the Public Policy Institute of California reported earlier this year that there was only a 5-30 percent chance of delta smelt avoiding extinction in the near future if additional protections were not required.⁵ This is consistent with the district court's findings last year, which found that the delta smelt could go extinct within the year⁶ and that "[o]perations of the CVP and SWP under the existing OCAP, among other causes, are both increasing risk to the survival and recovery of the Delta smelt and adversely modifying its critical habitat."⁷ The Governor's Delta Vision Blue Ribbon Task Force similarly recognized that "[f]reshwater flow conditions in the Delta must change in order to revitalize the ecosystem and the species that live in it" and recommended

³ See transcript (*PCFFA v. Gutierrez*), Thursday, September 11, 2008, at 14, 24-25

⁴ See letter from Bureau of Reclamation to U.S. Fish and Wildlife Service dated May 16, 2008.

⁵ See Public Policy Institute of California, *Comparing Futures for the Sacramento-San Joaquin Delta* (2008) at ix and Appendix E.

⁶ *NRDC v. Kempthorne*, 2007 WL 4462395, at *3-4 (E.D. Cal., Dec. 14, 2007).

⁷ *Id.* at *19. In addition, because of the extremely low abundance numbers, scientists anticipate that it will take many years for the delta smelt population to recover. However, the latest abundance data from the Department of Fish and Game show a slight uptick as compared to last year's data and may indicate that increased protections are beginning to stem the decline. The protections afforded by the district court's interim remedy order appear to have reduced entrainment by approximately 25% as compared to last year (from approximately 2,700 to 2,000 fish).

higher Delta outflows in most years, particularly in spring and fall, to protect delta smelt and other fish species.⁸

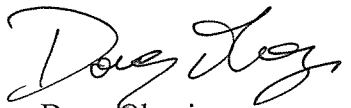
While some have and will continue to complain about any limits on water project operations, there is little question that additional protections are necessary to restore the many fish species that live or migrate through the delta that have recently suffered perilous declines. This will require a reduction from recent record levels of diversions to a more sustainable and reliable level of CVP and SWP diversions. A strong, scientifically based biological opinion on the effects of the water projects on delta smelt is a critical cornerstone to reversing this trend and preventing the delta smelt and other species from going extinct in the near future. However, more is needed. Like the Delta Vision Blue Ribbon Task Force, we believe that a long term solution that meets the water needs of fish and people will require investing in alternative water supply sources, such as water conservation and efficiency, sustainable groundwater management, stormwater infiltration, and water recycling. Data from DWR shows that such efforts could yield more new water each year than has *ever* been exported from the Delta, while also helping to reduce other environmental problems, like water pollution and electricity use and attendant greenhouse gas emissions. We also agree with the Delta Vision Task Force that restoration of the Delta ecosystem will require actions to address other stressors on the Delta ecosystem, including water pollution, habitat loss and invasive species.

In conclusion, we respectfully request that the Service promptly issue the final BO and ensure that the opinion is based on sound science. We look forward to continuing to work with you to restore and protect the delta environment and to meet California's water needs. Please feel free to contact us at your convenience if we can assist you in any way.

Sincerely,



Barry Nelson
Senior Policy Analyst



Doug Obegi
Staff Attorney

cc: Senator Barbara Boxer
Senator Dianne Feinstein
Representative George Miller
Representative Nick Rahall
Representative Mike Thompson
Representative Grace Napolitano
Representative Ellen Tauscher
Representative Jerry McNerney
Governor Arnold Schwarzenegger
Michael Chrisman, Resources Secretary, State of California
Lester Snow, Director, Department of Water Resources
Donald Koch, Director, Department of Fish and Game

⁸ Delta Vision Strategic Plan at 86-87.

Senate President Pro Tempore Darrell Steinberg
Speaker of the Assembly Karen Bass
Senator Fran Pavley, Chair, Senate Natural Resources and Water Committee
Senator Lois Wolk
Assemblyman Jared Huffman, Chair, Assembly Water Parks and Wildlife Committee

SACRAMENTO BEE

My View: Delta water plan is key to California's future

By Tom Zuckerman

Published: Thursday, Dec. 04, 2008 | Page 13A

This month, the U.S. Fish and Wildlife Service will release a draft plan to protect the endangered Delta smelt, which lives only in the Sacramento-San Joaquin River Delta. Last year, a court order to protect the smelt drew protests from water users south of the Delta who are concerned about their water supply. We sympathize, because we also understand the importance of water.

We represent, respectively, farmers in the Delta and California's commercial salmon fishermen. Our communities depend on water. Healthy rivers produce healthy salmon runs, sustaining fishermen, their families and fishing communities. Delta farmers also depend on healthy rivers.

When others divert too much water from the ecosystem, Delta farmers find their crops damaged by salty water intruding from the bay and the salty San Joaquin River drainage discharges that collect in the South Delta, as a result of the operation of the export pumps.

For the past five decades, we have seen steady increases in the amount of water pumped from the Delta – to record levels in recent years. Today, as a direct result, the entire Delta ecosystem is collapsing. In addition to the smelt, some salmon runs, steelhead, sturgeon and other fish are threatened by extinction.

This damage is no surprise. The massive pumps in the Delta divert more water than is pumped at any single location in the nation.

State and federal agencies ignored the Delta's collapse and failed to act when science showed its cause. That's when a federal court stepped in and ordered the federal government to prepare a new plan to protect the smelt under the Endangered Species Act.

Limitations on Delta pumping can protect more than just this vulnerable fish. The plan can also help fishermen and farmers.

The futures of our communities are at stake. This year, California's salmon fishery was closed for the first time in state history, putting thousands out of work and costing California's economy a quarter of a billion dollars. The fall run of chinook salmon in the Bay-Delta system is the most important in the state and is the backbone of our commercial and recreational fishery.

Unfortunately, the fall run has suffered the same collapse as the Delta smelt. If agencies fail to protect the smelt, we could lose the salmon fishing industry forever, damaging communities throughout the Central Valley, the Delta and along much of the California coast.

Delta farmers are also deeply concerned. The State Water Project has indicated that it intends to divert even more water in the future – violating water quality standards and putting the future of

Delta farmers at risk. Extensive scientific investigation in the past several years has reached a clear conclusion. We have exceeded the amount of water we can safely pump from the Delta.

Recently, the governor's Delta Vision Task Force recommended significantly stronger standards to guarantee more fresh water for the bay and Delta, especially during dry and average years. These conclusions raise an obvious question. How can we restore our salmon fishery, protect the bay, save farmers in the Delta, and meet our water needs?

Fortunately, we know the answer. By dramatically increasing efforts to maximize water conservation, to recycle wastewater, and to integrate groundwater replenishment and stormwater management, we can provide water for California's future. By working together, we can protect the futures of the smelt, salmon fishermen, Delta farmers and the millions of Californians who receive water from the Delta.

The catalyst for this new direction is the Delta smelt, but the stakes are far higher. The future of the largest estuary on the West Coast is at stake. We urge the Fish and Wildlife Service to require adequate protections for the smelt, reflecting the latest scientific results – thereby also providing a safety net for fishing and Delta farming communities.

Tom Zuckerman is the special projects manager of the Central Delta Water Agency. Zeke Grader is the executive director of the Pacific Coast Federation of Fishermen's Associations.